No. 78-1175

In the Supreme Court of the United States

OCTOBER TERM, 1978

HATZLACHH SUPPLY COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is reported at 579 F. 2d 617.

JURISDICTION

The opinion and judgment were entered on July 14, 1978. A timely petition for rehearing was denied on September 29, 1978 (Pet. App. 9a). The Chief Justice extended the time for filing a petition for certiorari to January 27, 1979 (Pet. App. 10a). The petition was filed on January 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied bailment contract when goods are lost while detained by the United States Customs Service following their seizure for customs violations.

STATEMENT

Petitioner imported certain camera supplies and miscellaneous items from Germany in 1970. This merchandise was seized and declared forfeited to the United States by the Customs Service on its arrival at the port in New Jersey. This action was taken because customs officials discovered a discrepancy between the descriptions of the merchandise submitted on arrival and the items in fact landed (Pet. App. 2a). Petitioner applied for return of the seized items,[1] and Customs officials agreed to return the goods to petitioner after payment of a $40,000 penalty. The penalty was paid, but when the merchandise was returned to petitioner certain items were missing.

On March 17, 1976, approximately six years after the goods were landed, petitioner filed this suit in the Court of Claims seeking to recover $165,220.50, which it alleged to be the value of the goods "pilfered" or "stolen" while in the custody of the Customs Service[2] (Pet. App. 2a). The government moved for summary judgment, alleging that the complaint failed to state a claim within the jurisdiction of the court (Pet. App. 2a). The Court of Claims granted the motion, holding that petitioner had not stated a claim for breach of an implied bailment contract, and therefore had failed to state a claim on which the court could grant relief (Pet. App. 8a).

The court concluded that because the Federal Tort Claims Act, 28 U.S.C. 2680(c), bars "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs" (Pet. App. 4a),

[1]See 19 U.S.C. 1618; 19 C.F.R. 171.11-171.13.

[2]Petitioner also sought to recover $2,000,000 for loss of "face and good will" (Pet. App. 2a). This claim was denied and is not in issue here.

and thus precludes recovery on claims arising from tortious actions by government agents in the course of customs detentions, it would be "a trespass on congressional prerogatives * * * to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole" (Pet. App. 7a; emphasis in original). Because of this express disclaimer of liability by the government, the court reasoned that it could not find an implied agreement by the government to pay for the value of petitioner's missing merchandise (Pet. App. 7a).[3] The court indicated, however, that it would not consider its decision "as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.* a promise, representation or statement that the goods would be guarded or carefully handled" (Pet. App. 8a). In the latter circumstances, the court indicated, a claim might lie under the Tucker Act even though 28 U.S.C. 2680(c) precluded recovery under the Federal Tort Claims Act (*ibid.*).

ARGUMENT

The decision of the Court of Claims is correct, and there is no need for further review.

Persons seeking recovery from the United States for damages allegedly done them ordinarily must rely on one of two bases of liability—tort or contract. The first is governed by the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*; the second usually is governed by the Tucker Act, 28 U.S.C. 1346(a). Petitioner's attempt to recover under a tort theory

[3]The court cited its previous decision in *Somali Development Bank* v. *United States*, 508 F. 2d 817, 822 (1974), where it had noted that there can exist no contract implied-in-fact unless there is an actual "meeting of the minds" and a mutual intent to be bound.

would be doomed by 28 U.S.C. 2680(c), which bars recovery on account of "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs * * *." Petitioner apparently recognizes that it cannot recover in tort,[4] and it accordingly seeks to recover under a theory of contract the value of the part of its shipment that disappeared while being detained by customs officials.

The problem with petitioner's contract theory is that it never entered into a contract with the government. There was no written document of any sort and no oral agreement. Petitioner therefore argues that a contract of safe bailment should be implied and then made the basis of liability.

This is a difficult argument for petitioner to make. The goods in question came into the hands of the Customs Service on their importation into the country; they came into federal custody not as a result of any negotiations or agreement but rather as a matter of federal law. Customs officials then retained custody because the documents under which the importation was made falsely described the merchandise. In light of this misdescription, the United States became entitled to the goods; they were forfeit. See 19 U.S.C. 1618; *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890). Consequently, the goods then were held not for the benefit of petitioner but for the benefit of the United States. They were not the subject of any "implied" promise of bailment. In this sequence of events there was no mutual exchange of promises, no consideration, none of the things that ordinarily mark the creation of a contract.

Indeed, the "implication" of a bailment contract concerning the detention of goods by customs officials

[4]If only because the statute of limitations on tort claims expired before it filed this suit.

would simply be a backhanded way of deciding to disregard the principle of 28 U.S.C. 2680(c): that the United States is not liable for "any" errors occurring "in respect of" detentions of goods on importation. Section 2680(c) would not preclude recovery if there were a genuine contract of bailment, because the Tort Claims Act does not purport to modify the Tucker Act. But Section 2680(c) surely precludes petitioner's effort to turn a tort into a contract suit by the invention of a fictitious "implied" contract of bailment. The Court of Claims agreed with this reasoning, and we rely on its opinion (Pet. App. 3a-7a).

It is true, as petitioner points out, that *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (2d Cir. 1958), held that Section 2680(c) does not bar an award of damages for the loss of merchandise during the process of customs inspection. The court reasoned that a contract of bailment must be implied because the government had obtained possession of another's goods for the government's benefit; the court also thought that Section 2680(c) applied only in cases of illegal detention and not in cases of proper detention negligently carried out. The Court of Claims here explicitly refused to follow *Alliance* (Pet. App. 6a-7a), thus joining many other courts that have distinguished or rejected the reasoning of that case. See, *e.g.*, *Walker* v. *United States*, 438 F. Supp. 251, 258-259 (S.D. Ga. 1977); *S. Schonfeld Co.* v. *SS Akra Tenaron*, 363 F. Supp. 1220, 1223 (D. S.C. 1973); *United States* v. *Articles of Food*, 67 F.R.D. 419, 425 (D. Idaho 1975).[5] See also *United States* v. *One (1) 1972 Wood*,

[5]*Alliance* was cited with apparent approval in *A-Mark, Inc.* v. *United States Secret Service*, No. 77-2152 (9th Cir. Nov. 13, 1978), but that case did not involve the detention of goods by customs officers. The case does, however, appear to follow *Alliance* in restricting Section 2680(c) to claims arising out of illegal detention, thus allowing tort recoveries for damages sustained during an otherwise-proper detention. See *United States* v. *Lockheed L-188 Aircraft*, No. 77-1131 (9th Cir. Feb. 15, 1979), slip op. 537 n.16.

19 Ft. Custom Boat, 501 F. 2d 1327, 1330 (5th Cir. 1974).

The rule of *Alliance* produces an astonishing result: if the government wrongfully seizes property and then loses it, the owner has no recovery; if the government properly seizes chattels because they are subject to forfeiture and then loses them, the owner (whose false documents projected the chattels into the government's custody) can recover. It is unlikely that Congress intended to create such a topsy-turvey rule.

The legislative history supports our submission, for it shows that Congress intended "to prohibit actions in conversion" arising from detention of goods. See S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), which states that Sections 2680(b) and (c) exempt from recovery

> claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers * * *.

See also *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 44 (1942); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, 45 (1946). What petitioner seeks, and what *Alliance* allowed, is an "action in conversion" of the detained goods, and that is precisely what the statute forbids.

Although we therefore conclude that *Alliance* is wrong,[6] the principles of that case apparently would

[6] *A-Mark, Inc.* v. *United States Secret Service, supra*, also is incorrectly decided to the extent it adopts the reasoning of *Alliance*.

permit petitioner to seek recovery here despite the differences between the cases. It would be immaterial, under the analysis of *Alliance*, that the goods involved in this case were seized and held for forfeiture, while the goods involved in *Alliance* itself apparently were properly entered.[7] The other technical distinction between the cases—in *Alliance* the Customs Service had furnished "tickets" to the importer so that it could claim its goods, while here there were none—also would play little role in the analysis.

It is possible, however, that the Second Circuit would retreat from the broadest possible reading of *Alliance* in a case such as the present one. *Alliance* did not involve goods seized for forfeiture, and the government's special interest in such goods would call for different treatment despite the broad language of *Alliance*. A bailment cannot be implied for forfeited goods—even if it may be implied for other goods—because the goods subject to forfeiture are no longer being held for the importer's benefit. See *Walker* v. *United States, supra*, 438 F. Supp. at 258. It remains to be seen how the Second Circuit would treat a case such as the present one. This, coupled with the fact that situations such as the present do not arise frequently, leads us to submit that the petition for certiorari should be denied despite the conflict in the rationales used by the Court of Claims and the Second Circuit.

[7] The *Alliance* opinion apparently would treat the seizure for forfeiture simply as a reason why the goods properly were in the government's possession. It would then permit the importer, having obtained a remission of the forfeiture and having paid the penalty, to show that the goods thereafter were treated wrongfully.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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